Supreme Court, U.S.
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No. 97-1091

In The

Supreme Court of the United States

October Term, 1997

IRIS M. SUMMIT,

Petitioner,

v.

S-B POWER TOOL (Skil Corporation)
a division of Emerson Electric,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Eighth Circuit render a decision which conflicted with previous decisions of the Supreme Court?

Did the United States Court of Appeals for the Eighth Circuit sanction a departure by the district court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision?

PARTIES TO THE PROCEEDINGS AND DISCLOSURE PURSUANT TO RULE 29

The Respondent, S-B Power Tool Co., was previously a joint venture of Robert Bosch Corp. and Emerson Electric Co. S-B Power Tool is now a wholly owned subsidiary of Robert Bosch GmbH. Robert Bosch Corp. is also a wholly owned subsidiary of Robert Bosch GmbH, which is owned by Robert Bosch Stiftung.

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STATEMENT OF THE CASE

On October 1 and 2, 1996, this case was tried to a jury. The Petitioner, Iris M. Summit ("Summit"), alleged that she was constructively discharged based upon her age and her sex in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and Title VII, 42 U.S.C. § 2000e-5 *et seq.* The Respondent, S-B Power Tool ("S-B Power Tool"), moved for judgment as a matter of law at the close of Summit's case and at the close of all of the evidence, but the trial court reserved judgment on the motion. On October 2, the jury returned a verdict in favor of Summit on her sex discrimination claim, but against her on her age discrimination claim. The Court declined to enter judgment on the verdict and instead entered judgment as a matter of law in favor of S-B Power Tool.

Prior to her resignation, Summit worked as a supervisor at S-B Power Tool. In approximately January 1994, problems regarding alleged favoritism with overtime assignments by Summit came to the attention of the Human Resources Manager, Donna Meyer ("Meyer"), when three employees who worked for Summit came to her office to complain regarding Summit. Following an investigation, Summit was given a warning in March 1994 regarding various performance issues and her review and raise were postponed. Once she showed signs of improvement, she was given her review and a retroactive raise.

S-B Power Tool's business is seasonal. Typically from June to December, it hires temporary employees and adds additional lines on the second shift to get out the extra

production necessary during its busy season. Prior to the busy season in June of 1994, the decision was made to temporarily transfer Summit to the second shift. In addition to Summit being a good choice, Meyer and supervisors in Summit's chain of command felt that a temporary move to a new group of employees would give Summit a fresh start from the problems she had experienced previously. Summit's replacement was a female, Sue Rogers ("Rogers"). Over the years, young males were also temporarily transferred to the second shift.

Also in June of 1994, David Hoffman ("Hoffman"), a male, was promoted to temporary unit manager on the second shift. His performance ratings were consistently better than Summit's ratings and he did not have any disciplinary action on his record, while Summit had received a disciplinary action three months previously.

Summit exhibited problems again which eventually led to her receiving a written warning on August 11, 1994. The warning gave her sixty days to improve her performance or further disciplinary action could be taken that could lead to termination. No problems occurred relating to Summit during that sixty day period.

Summit filed a charge of discrimination on February 15, 1995. Evidence of alleged discriminatory events which included two disciplinary actions, a transfer, and a promotion of a male employee was admitted for the limited purpose of providing background evidence, as each event occurred more than 180 days before Summit filed her charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Summit could not

recover for events which occurred prior to August 19, 1994.[1] Summit introduced no evidence of discriminatory actions within the 180 days prior to the date she filed her charge.

On October 10, sixty days elapsed from the date of Summit's last warning with no further disciplinary problems. However, on October 17, 1994, Summit quit her job. Nothing significant occurred between August 19 and October 17. When she quit, Summit had received no more disciplinary actions since the August 11, 1994 warning and was not facing discharge. She had been working on the second shift and had been responsible for her temporary employees for three months. Furthermore, it had been approximately two months since Hoffman received his temporary promotion. Significantly, both females and males took up Summit's former job responsibilities after she quit.

Another supervisor, Bobby Luster ("Luster"), a male, resigned in lieu of termination on August 11, 1994. Significantly, Luster received a written warning around the

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[1] S-B Power Tool filed a Motion in Limine to exclude certain evidence. At the end of Summit's testimony, the trial judge excluded evidence of an alleged sexual advance by a supervisor which occurred at least six years prior to the time that Summit resigned her position. There was no allegation that the supervisor ever made any other advances after he was allegedly disciplined for his conduct. Additionally, the trial court excluded some testimony of a witness who left the company at least one year prior to Summit's resignation. Finally, the judge excluded testimony regarding retaliation for refusing to submit to sexual advances six years previously as the result of remoteness, relevance and Summit's failure to file a charge on the issue.

time that Summit received her verbal warning in writing and was terminated on the same day Summit received her written warning on August 11. Luster had also been transferred to the second shift.

REASONS TO DENY THE WRIT

A. SUMMARY OF ARGUMENT

In support of its Petition for Certiorari, Summit lists two grounds for this Court to take up this case. She alleges that the lower court's actions conflict with previous United States Supreme Court decisions and that the Court of Appeals sanctioned a departure by the district court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. First, the Eighth Circuit Court of Appeals decision does not conflict with any Supreme Court decision. Rather, it is supported by significant and substantial case law. Second, Summit completely fails to establish that the lower court decisions so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. Neither of these issues are sufficient to warrant review by the Supreme Court, and the Petition should be denied.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Rule 10 of the Rules of the Supreme Court of the United States. A petition for a writ of certiorari will be granted only for compelling reasons. Rule 10. The types of reasons the Court will consider includes the Court of Appeals deciding an important

federal question in a way that conflicts with relevant decisions of the Supreme Court or the Court of Appeals so far departing from the accepted and usual course of judicial proceedings, or sanctioning such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power. Rule 10. This Petition and the issues presented therein satisfy none of the criteria for the Supreme Court to grant certiorari.

B. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE SUMMIT HAS NOT ESTABLISHED THAT THE LOWER COURTS' DECISIONS CONFLICT WITH PREVIOUS DECISIONS OF THE SUPREME COURT.

Summit asserts that the decisions of the trial court and the Eighth Circuit Court of Appeals conflict with previous decisions of the Supreme Court. Summit claims that the lower court decisions were contrary to an Eighth Circuit case, *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490 (8th Cir. 1996), and a United States Supreme Court case, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). *Tidwell* is a constructive discharge case, while *Harris* is a sexual harassment case. Because there is absolutely no merit to this assertion, it is inappropriate for the Court to grant certiorari based upon this ground.

In the Petition for Writ of Certiorari on page 7, Summit characterizes the "principle" question as "whether Summit's working conditions preceding her resignation were sufficiently hostile to support the jury's verdict" and cites to *Harris*. Summit's emphasis on the law relating to hostile work environment sexual harassment is

misplaced as her case was not tried as a sexual harassment case. Moreover, this is not the standard for establishing constructive discharge.

The jury instructions submitted by the parties and given by the trial judge indicate that this case was tried as a constructive discharge claim based upon sex and age. Summit submitted no jury instructions on hostile work environment and the instructions actually given by the court did not instruct the jury on sexual harassment or hostile work environment. At the time that Summit agreed to the instructions submitted by S-B Power Tool, the trial court had not yet ruled upon S-B Power Tool's Motion in Limine to exclude certain evidence; thus, Summit cannot argue that the jury was not instructed on sexual harassment as the result of the trial judge's ruling on admissibility of sexual harassment evidence. Counsel for Summit had an obligation to object to instructions and to proffer instructions to give to the jury on these issues if in fact those were the claims on which Summit rested her case, but did not do so. As a result, Summit's arguments now regarding sexual harassment are meaningless as the jury was never instructed on this issue and never rendered a finding on the issue. Thus, any argument regarding hostile work environment is not relevant to the decision whether there was sufficient evidence to support the jury's verdict that Summit was constructively discharged based upon her sex.

As recognized by the Court of Appeals, "[b]ecause only a claim of constructive discharge went to the jury, we will consider no other claims on appeal." Petition, p. 11a. Thus, Summit is restricted to the claims submitted to the jury, which do not include hostile work environment

sexual harassment. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Ford Motor Co. v. Summit Motor Prod., Inc.*, 930 F.2d 277, 295 (3d Cir. 1991), *cert. denied*, 502 U.S. 939 (1991); *Lambur v. Yates*, 148 F.2d 137, 138 (8th Cir. 1945).

On page 7 of the Petition, Summit asserts that the jury confirmed Summit's contentions as to hostile work environment sexual harassment. Such an assertion is completely without basis as the jury was never instructed on hostile work environment and it never made any findings with regard to harassment.

Even if the case had been tried as a sexual harassment case, Summit does not state how the Court of Appeals' decision conflicts with relevant decisions of this Court such as *Harris*. In fact, the Eighth Circuit's decision in no way conflicts with *Harris* as *Harris* did not even address the standard for constructive discharge.

Summit also argues that the Eighth Circuit Court of Appeals decided her case contrary to another Eighth Circuit case, *Tidwell*. Deciding a case contrary to another case in the same circuit is not the type of compelling reason this Court requires in order to grant certiorari. *See* Rule 10.

Both the trial court and the Court of Appeals recognized that the case at hand was remarkably similar to *Tidwell*. Summit now argues that *Tidwell* is in fact distinguishable and attempts to distinguish the case, pointing out facts that Summit believes the Court of Appeals, specifically Judge Frank Magill who authored both *Tidwell* and the decision at hand, failed to recognize. While Summit argues that this case is distinguishable from and decided wrongly in light of *Tidwell*, "[a] petition for a

writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Rule 10. Summit does not assert that the rule of law from *Tidwell* or any other case was improperly stated, just that the lower courts erred in applying the properly stated law to the facts herein. Thus, even assuming that the Eighth Circuit decision misapplied the correct law to Summit's facts, this reason is insufficient for the Supreme Court to use its valuable resources.

> The Court can, and should, establish and police a framework for the delegation and exercise of responsibility to and by the lower courts. Except in relatively rare situations justifying immediate intervention, the court as manager would accord a presumption of regularity and validity to the decisions of state and lower federal courts. A wise manager delegates responsibilities to subordinates and, absent an indication that something is awry, accords their decisions a presumption of validity. To do otherwise is to denigrate the authority of subordinate actors, thereby diminishing their own sense of responsibility and ultimately increasing the manager's tasks as well as the overall workload.

Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 282, n. 78 (1985) (Brennan, J., dissenting) (quoting Estreicher & Sexton, New York University Supreme Court Project 14-15 (executive summary), 59 N.Y.U.L. Rev. 677, 717-718 (1984)). As a wise manager, the Supreme Court should not intervene in this case.

More basically, the Court of Appeals properly decided this case. Both lower courts properly recognized that there was not sufficient evidence to support the jury

verdict that Summit was constructively discharged because of her sex. As the Court of Appeals correctly recognized, "Summit's evidence does not establish that the Company acted with the intention of forcing Summit to resign or that a reasonable person would have found her conditions of employment intolerable. First, her transfer to the second shift, complete with temporary employees and defective parts, is indistinguishable from *Tidwell*." Petition, p. 13a. Significantly, the events in the two months prior to Summit's resignation would not have compelled a reasonable person to give up her employment. The evidence in this case is such that reasonable persons could not differ as to the conclusion that Summit failed to meet her burden as to an element essential to her case. *Mulholland v. Schneider Serv. Co.*, 661 F.2d 708, 711 (8th Cir. 1981). Summit failed to establish that S-B Power Tool deliberately created intolerable working conditions with the intention of forcing her to quit. *Tidwell*, 93 F.3d at 494; *West v. Marion Merrill Dow, Inc.*, 54 F.3d 493, 497 (8th Cir. 1995); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1991). A "reasonable person" in Summit's position would not have felt compelled to resign. *West*, 54 F.3d at 497, quoting *Bunny Bread*, 646 F.2d at 1256; *Tidwell*, 93 F.3d at 494. A reasonable person would not find his or her conditions of employment intolerable simply because he or she supervised temporary employees. Supervisors before, during and after the time period of June through October 1994 were required to supervise temporary employees. Further, Summit merely requesting that regular employees be added to the shift is not sufficient action required to work out the problem.

Summit failed to establish that she faced objectively intolerable working conditions. *Tidwell*, 93 F.3d at 497. Importantly, other supervisors besides Summit, including males, had to work on the second shift and with temporary employees.

Summit also failed to show that an adverse action occurred during the limitations period as required to state a claim for constructive discharge. *See Stephney v. Hospital for Joint Diseases*, 1985 WL 4271, 48 Fair Empl. Prac. Cas. (BNA) 775, 778 (S.D.N.Y. 1985). At the time that Summit quit, conditions did not exist that were sufficient to cause a constructive discharge as nothing occurred in the relevant time period before Summit quit which would compel a reasonable person to quit her job. The events which Summit claims forced her to resign, *i.e.*, promotion of a male, transfer to another shift made up of mostly temporary employees, and reprimands, occurred outside of the 180 days prior to filing her charge and at least four months prior to her resignation. A reasonable person would not have felt compelled to resign because adverse action did not occur near the time of the resignation. *See Steele v. Offshore Shipbuilding*, 867 F.2d 1311, 1317 (11th Cir. 1989); *Geisler v. Folsom*, 735 F.2d 991, 996 (6th Cir. 1984).

Summit produced no evidence that the reason for S-B Power Tool's actions was sex discrimination. *Chambers v. American Trans Air, Inc.*, 17 F.3d 998, 1006 (7th Cir. 1994), *cert. denied*, 513 U.S. 1001 (1994). In fact, males were treated like Summit; thus, "no particular employee can claim that difficult working conditions signify the employer's intent to force that individual to resign."

Allen v. Bridgestone/Firestone, Inc., 81 F.3d 793, 797 (8th Cir. 1996) (citations omitted).

While *Tidwell* is remarkably similar to the situation at bar, Summit produced even less compelling evidence than the evidence in *Tidwell*. Thus, like in *Tidwell*, Summit failed to establish a constructive discharge.

In summary, Summit has failed to establish that the Court of Appeals' decision conflicts with any previous decisions of the Supreme Court. First, the Supreme Court case cited by Summit does not conflict with the Court of Appeals decision as *Harris* is a sexual harassment case, while the case at bar concerns an alleged constructive discharge because of sex. Second, a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law, as is asserted here. Third, judgment as a matter of law was properly granted because there was not sufficient evidence to support the jury verdict that Summit was constructively discharged.

C. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE SUMMIT FAILED TO ESTABLISH THAT THE EIGHTH CIRCUIT COURT OF APPEALS SANCTIONED A DEPARTURE BY THE DISTRICT COURT WHICH SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Summit's second ground for certiorari is that the Eighth Circuit sanctioned a departure by the trial court which so far departed from the accepted and usual course

of proceedings as to call for an exercise of the Supreme Court's power of supervision. Summit does not explain how the Eighth Circuit sanctioned this departure and what exactly this departure was.

Presumably, Summit asserts that the trial court improperly granted judgment as a matter of law in favor of S-B Power Tool on the sex discrimination claim pursuant to Rule 50 of the Federal Rules of Civil Procedure and the Court of Appeals improperly upheld this grant of judgment as a matter of law. First, as set forth above, both lower courts properly recognized that there was not sufficient evidence to support the jury verdict that Summit was constructively discharged because of her sex. Even assuming that a court could find that judgment as a matter of law should not have been granted or that the evidence was improperly excluded, such action does not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Summit also finds fault with the exclusion of certain evidence at trial. However, Summit fails to establish that the trial court abused its discretion in excluding evidence. *U.S. v. Hazelett*, 32 F.3d 1313, 1316 (8th Cir. 1995). As recognized by the Court of Appeals, the district court properly limited Summit's evidence concerning prior sexual advances toward her during or prior to 1988 in proving her claim of constructive discharge. The evidence was irrelevant and prejudicial. Summit never filed an EEOC charge concerning these events and did not submit any jury instructions on this issue.

Evidence of retaliation for having complained about sexual harassment in 1988 was also properly excluded because it was irrelevant and prejudicial, because Summit failed to file a charge of discrimination with the EEOC for retaliation, and because she did not try the case as a retaliation case and submitted no jury instructions on this issue. *See* Rules 401 and 403 of the Federal Rules of Evidence. Any evidence relative to the time-barred claim of retaliation was not relevant to her claim of constructive discharge based upon her sex or age, was inadmissible, and would have been highly prejudicial.

Additionally, exclusion of certain testimony by Merle Young ("Young") was properly excluded. Young had no personal knowledge of Summit's claim of discrimination and did not work at S-B Power Tool when any of the events of which Summit complained and which she claimed caused her to resign occurred. The testimony of Young was not relevant evidence and the admission of this evidence would have unjustly prejudiced S-B Power Tool, confused the issues, misled the jury, and would have resulted in a waste of time and needless presentation of cumulative evidence due to the tenuous connection this "evidence" would have to Summit's claims of gender discrimination. Rule 401, 402, and 403 of the Federal Rules of Evidence.

A trial court's exclusion of evidence under Fed. R. Evid. 402 and 403 is entitled to substantial deference on review. *Warner v. Transamerica Ins.*, 739 F.2d 1347, 1350 (8th Cir. 1984). The trial judge was in the best position to determine the propriety of excluding evidence. Even if the exclusion was error, it did not affect a substantial right of Summit and constituted harmless error. Rule

103(a) of the Federal Rules of Evidence; *U.S. v. DeAngelo*, 13 F.3d 1228, 1233 (8th Cir. 1994), *cert. denied*, 512 U.S. 1224 (1994). With regard to the exclusion of the evidence, Summit was not hampered in any way in showing that adverse action was taken against her within the 180 days prior to her filing of a charge of discrimination.

Summit cites *Hawkins v. Hennepin Technical Center*, 900 F.2d 153 (8th Cir. 1990), *cert. denied*, 498 U.S. 854 (1990), and *Estes v. Dick Smith Ford*, 856 F.2d 1097 (8th Cir. 1988), in support of her argument that the lower court improperly excluded evidence. *Estes* is distinguishable because the trial court granted the exclusions before the trial began; thus, the Court of Appeals examined the consequences of the exclusion with particular care. *Estes*, 856 F.2d at 1103. In contrast, the trial judge in this case made its determinations of probative value and prejudice after Summit finished her testimony.

Further, in *Hawkins* and *Estes*, the plaintiffs needed some latitude in presenting evidence to show motive. In contrast, the evidence proffered by Summit did not go to show motive or pretext. Significantly, Summit failed to establish that a reasonable person would have been compelled to quit and that there was action that occurred near the time Summit quit or within the relevant time period. The deficiency in Summit's case was not motive.

The Federal Rules of Civil Procedure provide mechanisms for federal judges to grant motions for judgment as a matter of law, even if granting such motions results in the nullification of a jury's verdict. Further, the Federal Rules of Civil Procedure also provide the mechanism for federal judges to use their individual discretion to limit

evidence to be submitted to the jury. In this case, the district court judge merely used his discretion and judgment through the mechanism provided by the Federal Rules of Civil Procedure. Judges do this every day. Summit simply disagrees with the judge's exercise of discretion and judgment within the authority given him by the Federal Rules of Civil Procedure. However, such a disagreement is not a valid basis for granting a writ of certiorari.

In summary, Summit has not established that the Court of Appeals sanctioned a departure by the district court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Certainly, the grant of judgment as a matter of law or the exclusion of some evidence is not the kind of departure required for the Supreme Court to take the unusual step of exercising its power of supervision. Furthermore, the trial court properly granted judgment as a matter of law and properly excluded evidence.

CONCLUSION

Summit has failed to show grounds for certiorari to be granted on this matter. For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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